

**COMMONWEALTH OF KENTUCKY  
KENTUCKY BOARD OF TAX APPEALS  
FILE NUMBERS K00-R-31, K02-R-30,  
K02-R-31 AND K02-R-32**

**ASWORTH CORPORATION, HT-FORUM, INC.  
(N/K/A HTF, LLC) AND D AVIATION SERVICES,  
INC. (N/K/A D AVIATION SERVICES, LLC)**

**APPELLANT**

**V.**

**ORDER NO. K-19449**

**REVENUE CABINET (N/K/A FINANCE  
AND ADMINISTRATION CABINET,  
DEPARTMENT OF REVENUE),  
COMMONWEALTH OF KENTUCKY**

**APPELLEE**

After consideration of all evidence presented at the hearing on October 12, 2005 and having reviewed the case including briefs, proposed finding of fact and conclusions of law and being otherwise sufficiently advised, the Kentucky Board of Tax Appeals hereby enters the following findings of fact, conclusions of law and order:

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND FINAL ORDER**

This matter was brought before the Kentucky Board of Tax Appeals by petition of ASWORTH CORPORATION. Consolidated with that petition were similar appeals by HT-FORUM, INC. (N/K/A HTF, LLC) and D AVIATION SERVICES, INC. (N/K/A D AVIATION SERVICES LLC). It was stipulated that all issues arising in the ASWORTH appeal are common to all other APPELLANTS. As such all similarly situated parties will be referred to herein jointly as APPELLANT.

APPELLANT'S petition raised several issues regarding the final ruling of the

REVENUE CABINET (N/K/A FINANCE AND ADMINISTRATION CABINET, DEPARTMENT OF REVENUE) COMMONWEALTH OF KENTUCKY, referred to herein as THE DEPARTMENT. By agreement and/or stipulation many of the issues raised in the petition were resolved between the parties during the morning session of the hearing in this matter held in Frankfort before the full board on October 12, 2005.

With the generous assistance of counsel for both parties nearly all facts necessary for a determination of the issues in this case were agreed to or stipulated.

Of particular significance THE DEPARTMENT, through counsel, stipulated that the APPELLANT was, at all relevant times a foreign corporation. THE DEPARTMENT also stipulated that APPELLANT'S sole connection with the Commonwealth was its receipt of a distributive share of partnership income received from the profits of variously named and organized partnerships doing business in Kentucky.

THE DEPARTMENT also stipulated that during the tax periods at issue in this case a "substantial nexus" with Kentucky was required in order for the Commonwealth to collect an income tax on foreign corporations.

While THE DEPARTMENT stipulated that THE APPELLANT had no "physical presence" in the Commonwealth THE DEPARTMENT took the position that "physical presence" was not required in order for Kentucky to impose income tax on THE APPELLANT. THE DEPARTMENT argued that THE APPELLANT'S receipt of a "partnership distributive share" from an entity doing business in Kentucky was enough to satisfy the "substantial nexus" test.

APPELLANT argues that the imposition of income tax on foreign corporations during the periods in question was limited to those foreign corporations "owning or

leasing property located in this state or having one (1) or more employees receiving compensation . . . in this state”. KRS 141.040. Because THE DEPARTMENT agreed that APPELLANT did not meet this test APPELLANT argues that it was not subject to income taxes.

APPELLANT also advanced the argument that before Kentucky can constitutionally impose an income tax on foreign corporations a “physical presence” is necessary in order to satisfy the constitutionally required “substantial nexus” test.

The parties also argued that should the Board decide that THE APPELLANT was subject to corporate income tax that either a “single prong” test (THE DEPARTMENT’S position) or a “three prong” test (THE APPELLANT’S position) for apportionment should be applied in calculating that tax. Because we find that a much narrower issue is dispositive of this case, we do not reach this or the other issues presented for consideration.

### **FINDINGS OF FACT**

Based upon the stipulations and agreements of the parties in the record of this matter the Board makes the following FINDINGS OF FACT.

1. THE APPELLANT is a foreign corporation.
2. THE APPELLANT had no “physical presence” in Kentucky during the relevant tax periods.
3. THE APPELLANT received a distributive share of income from partnership entities doing business in Kentucky during the relevant tax periods and this was THE APPELLANT’S sole connection with Kentucky.
4. THE APPELLANT neither owned nor leased property in Kentucky nor had one or more employees receiving compensation in Kentucky during the relevant tax periods.

**CONCLUSIONS OF LAW**

Based upon the entire record and the FINDINGS OF FACT made above, the Board makes the following CONCLUSIONS OF LAW.

During the relevant tax periods the Kentucky Legislature imposed a tax upon foreign corporations owning or leasing property in this state or which had one or more employees receiving compensation in this state. KRS 141.040. During these periods Kentucky did not impose a tax on partnerships.

Because THE APPELLANTS did not own or lease property in Kentucky or have one or more employees receiving compensation here the clear and unambiguous language of KRS 141.040 did not reach the distributive share paid to them by partnerships doing business in the Commonwealth.

Because we believe that it is our function to consider the narrowest issue which is dispositive of this controversy we need not address the other issues raised by these appeals.

**ORDER**

**IT IS HEREBY ORDERED** that the APPELLANTS are relieved of the taxes, penalties and interest which are the subject of this appeal and entitled to all other relief afforded by statute for the collection and enforcement of this order.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order

of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

Order No. K-19449

**DATE OF ORDER  
AND MAILING: January 27, 2006**

**KENTUCKY BOARD OF TAX APPEALS  
FULL BOARD CONCURRING**

**NANCY MITCHELL  
CHAIR**